MICHIGAN SUPREME COURT

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CHALLENGE TO SEX OFFENDER REGISTRATION BEFORE MICHIGAN SUPREME COURT IN ORAL ARGUMENTS NEXT WEEK

Defendant admitted "bullying" three-year-old boy by twice flicking boy's penis; was touch "sexual offense" for purposes of state's Sex Offenders Registration Act?

LANSING, MI, April 1, 2011 – A man who twice flicked a three-year-old boy's penis while babysitting is challenging a court order requiring him to register as a sex offender, in a case that the Michigan Supreme Court will hear in oral arguments next week.

The defendant in *People v Lee* admitted touching the boy's genitals, but said he did so to get the child's attention when the boy would not put on his pajamas after his bath. The defendant pled guilty to third-degree child abuse; at sentencing, the trial judge rejected a prosecutor's request to have the defendant register under Michigan's Sex Offender Registration Act. But 20 months after the defendant served his sentence, another judge ruled that the defendant must register as a sex offender. The court applied a catch-all provision in SORA that requires registration for a violation of state law that "by its nature constitutes a sexual offense against an individual who is less than 18 years of age." The Michigan Court of Appeals upheld the lower court, reasoning that the defendant's actions did amount to a "sexual offense" because the state's child abuse statute defines "sexual contact" to include touching a child's genitals "to inflict humiliation" or "out of anger." The defendant had admitted flicking the boy's penis as a form of "bullying" and the trial judge had stated that the defendant's touching was "a rather abusive assault on a young man's self-dignity and self value," the Court of Appeals noted. Moreover, although the defendant had completed his jail term, he was still on probation and under the lower court's jurisdiction, so the judge did not violate legal procedure when he ordered the defendant to register under SORA, the appellate panel concluded.

Also before the Supreme Court is *People v Kowalski*, in which the defendant made sexual comments in an internet chat room to a police detective posing as a 15-year-old girl. A jury convicted the defendant of accosting a minor for immoral purposes and using a computer to do so, but the Court of Appeals reversed the defendant's convictions and ordered a new trial. The trial court failed to instruct the jury that the defendant had to commit certain acts (the *actus reus*) in order to be convicted of the crime, the Court of Appeals said: "The trial court's instructions omitted any mention that the jury must find that defendant actually accosted, enticed, or solicited the victim to engage in the prohibited acts." The prosecutor appeals that ruling; the defendant has also appealed, arguing in part that his trial lawyer was ineffective and that the prosecutor did not present sufficient evidence to establish the defendant's guilt beyond a reasonable doubt.

The Court will hear two other criminal cases, *People v Novak* and *People v Bailey*. Also before the Court is *Krohn v Home-Owners Insurance Company*, in which the Court will consider a claim under the state's no-fault law to recover the costs of experimental surgery.

The Court will hear oral arguments in its courtroom on the sixth floor of the Michigan Hall of Justice on **April 5, beginning at 9:30 a.m.** The Court's oral arguments are open to the public.

Please note: the summaries that follow are brief accounts of complicated cases and may not reflect the way that some or all of the Court's seven justices view the cases. The attorneys may also disagree about the facts, issues, procedural history, or significance of their cases. Briefs are online at http://www.courts.michigan.gov/supremecourt/Clerk/MSC_orals.htm. For further details about the cases, please contact the attorneys.

Tuesday, April 5
Morning Session

PEOPLE v NOVAK (case no. 140800)
Prosecuting attorney: Sylvia L. Linton/(989) 895-4185
Attorney for defendant George Thomas Novak: Valerie R. Newman/(313) 256-9833
Trial Court: Bay County Circuit Court
At issue: The defendant was convicted of one count of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct as a result of alleged abuse of his granddaughter. The trial court departed upward from the sentencing guidelines, sentencing the defendant to a prison term of 20 to 40 years. On appeal, the defendant objected to his sentence, and objected that the trial court erred when it admitted into evidence a pornographic short story that the defendant authored, on the theory that it was admissible as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident within the meaning of MRE 404(b)(1). The Court of Appeals affirmed the defendant's convictions. Was the admission of the story reversible error? Is the defendant entitled to a new trial, or to sentencing relief?
Background: George Novak's nine-year-old granddaughter testified at trial that he touched her breasts and, while clothed, touched his genital area to her "back butt." The trial court permitted the prosecutor to present testimony from others whom Novak had allegedly sexually abused, including Novak's adopted daughter, the girl's mother. The trial court also ruled that the prosecutor could admit into evidence a pornographic story that Novak wrote graphically depicting sexual acts among teen-aged siblings, their father, and their cousin. The trial court reasoned that this evidence was admissible under MRE 404(b)(1), which states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case."

The jury convicted Novak of one count of first-degree criminal sexual conduct, and one count of second-degree criminal sexual conduct. In sentencing Novak, the trial court departed upward from the recommended sentencing guidelines, imposing 20 to 40 years for the first-degree criminal sexual conduct conviction, concurrent to a 10 to 22 years plus six-months for the second-

degree criminal sexual conduct conviction. The trial court agreed with the prosecutor that an upward sentencing departure was supported by two substantial and compelling reasons: Novak's sexual abuse of his adopted daughter, and his creation of the pornographic story.

Novak appealed, and the Court of Appeals affirmed his convictions and sentences in a split unpublished per curiam opinion. The majority agreed with the trial court that the pornographic story was admissible, concluding that it was "certainly probative of defendant's interest in sex with minors." The majority rejected Novak's argument that the story was inadmissible under MRE 404(b)(1), reasoning that the manual did not describe any other crime or prior act at all, and so did not fall under MRE 404(b)(1)'s general exclusionary rule. Novak's story amounted to a party admission and was therefore admissible under MRE 801(d)(2)(A), said the majority; the evidence's probative value was not substantially outweighed by the danger of undue prejudice under MRE 403. With regard to sentencing, the Court of Appeals majority held that the trial court did not abuse its discretion when it concluded that Novak's past abuse of his daughter, and the sex manual, were substantial and compelling reasons supporting an upward departure from the sentencing guidelines. The six-year departure, the panel held, was "more proportionate to [Novak's] actual offenses than that which would have been available within the guidelines range . . . ."

The dissenting Court of Appeals judge would have reversed Novak's convictions. The substance of the pornographic story had no relevance to whether Novak sexually abused his granddaughter, the dissent said; rather, the story was improperly admitted to establish that Novak had the "proclivity and desire to engage in incestuous relationships." The trial court should have excluded the story as character evidence; in the alternative, the evidence should have been excluded under MRE 403, due to the "high likelihood" that the story "would transgress most jurors' norms of decency and morality," the dissent reasoned. The danger of unfair prejudice "far outweighed" whatever marginal probative value the story may have possessed, the judge said. The dissenting judge also concluded that the trial court's stated reasons for departing from the sentencing guidelines were not substantial and compelling, and that the trial court failed to explain the sentencing departure. At a minimum, the dissenting judge determined, the trial court should resentence Novak. Novak appeals.

PEOPLE v KOWALSKI (case no. 141695)
Prosecuting attorney: Jonathan L. Poer/(517) 264-4640
Attorney for defendant Edward Michael Kowalski: Robert L. Levi/(313) 843-1888
Trial Court: Lenawee County Circuit Court
At issue: The defendant engaged in internet chats with a police detective posing as a 15-year-old girl. On the day the police executed a search warrant at his house, finding no computer, defendant was seen dumping plastic parts in a remote location. A jury convicted him of accosting, enticing, or soliciting a minor for immoral purposes and using the internet for the same purposes. The Court of Appeals reversed the defendant's convictions and remanded for a new trial. Did the trial court err in failing to instruct the jury that the defendant had to commit certain acts (the *actus reus*) in order to be convicted of the crime of accosting, enticing, or soliciting a child for immoral purposes, MCL 750.145a? If the trial court erred, was the error harmless? Did the defendant waive the instructional error? If so, did his attorney provide ineffective assistance of counsel? When viewed in a light most favorable to the prosecution, was the evidence at trial sufficient to enable a rational jury to find that the *actus reus* of the charged offense was proven beyond a reasonable doubt?

Background: On July 19, 2007, Adrian Police Detective Vincent Emrick went online posing as "keyanagurl" – a 15-year-old girl. According to Emrick's later testimony, Edward Kowalski, whose screen name was "mr_ltr_nmidmi_007," contacted "keyanagurl" in a Yahoo chat room; they had three conversations, in which Kowalski made sexual comments to "keyanagurl," even though "keyanagurl" said that she was 15 years old. When Emrick was unable to initiate a fourth conversation with Kowalski, he surmised that Kowalski had realized that "keyanagurl" was a police officer. On August 14, 2007, Emrick obtained a search warrant for Kowalski's house. The police search turned up a computer monitor, but no other computer equipment.

Kowalski was charged with accosting, enticing or soliciting a child for immoral purposes (MCL 750.145a) and use of the internet or a computer to accost, entice, or solicit a minor (MCL 750.145d). At trial, Emrick testified about his online chats with Kowalski. He also testified that, on the day of the search, Kowalski told him that he had no internet and no computer in his home, and that he did not have a Yahoo account. A second witness testified that he saw a man, whom he identified as Kowalski, who appeared to be dumping pieces of beige plastic. Another witness testified that, several years earlier when she was 22 years old, she met Kowalski in a chat room and developed a relationship with him. She testified that Kowalski was interested in young girls.

At the close of the prosecution's evidence, defense counsel moved for a directed verdict, arguing that the prosecution had not met its burden of showing that Kowalski "had the intent to solicit, accost, . . . or solicit . . . a pretend persona . . . ." The court denied the motion. Kowalski did not call any witnesses, but his attorney argued in closing argument that Kowalski did not invite "keyanagurl" to his home, initiate any kind of meeting with her, or proposition her for sex. What Kowalski did may have been offensive and in bad taste, but it was not criminal, his attorney contended.

During its deliberations, the jury asked the trial court to define "accost." The judge, after consulting with the attorneys, advised the jury that "accost" means to "approach and speak to, greet first before being greeted, especially in an intrusive way . . . ." About two hours later, the jury returned a guilty verdict on both counts. Kowalski was sentenced to six months in jail and five years' probation.

Kowalski filed two motions asking the trial court to grant a new trial; he argued that Emrick had perjured himself and that the prosecutor had not established the crime's *actus reus*, the physical act of committing the crime. Through appellate counsel, Kowalski argued that the jury instructions were defective and that his trial counsel provided ineffective assistance when he approved the instructions. The trial court denied Kowalski's motions.

In an unpublished per curiam opinion, the Court of Appeals reversed Kowalski's convictions and remanded the case to the trial court for a new trial. The panel concluded that the jury instructions were defective because they omitted any mention of the *actus reus* of the crime. The error was not remedied elsewhere in the instructions, and it was not harmless beyond a reasonable doubt because there was no way to determine whether the jury would have reached the same verdict had it been properly instructed, the appellate court said. The court did not address Kowalski's remaining claims of error, including his argument that the prosecutor presented insufficient evidence of the charged crimes to support his convictions.

The prosecutor and the Attorney General appeal the Court of Appeals ruling, and Kowalski appeals as cross-appellant.

PEOPLE v BAILEY **(case no. 141739)**
Prosecuting attorneys: Timothy K. McMorrow, Kimberly M. Manns/(616) 632-6710

Attorney for defendant Sammie Ray Bailey, Jr.: Michael L. Mittlestat/(517) 334-6069
Trial Court: Kent County Circuit Court
At issue: The defendant was convicted of second-degree murder and felony-firearm for shooting and killing a man who had robbed his half-brother. On appeal, the defendant argued that the trial court improperly instructed the jury regarding self-defense. The Court of Appeals reversed the defendant's convictions, concluding that the jury was not properly instructed and that these instructional errors were not harmless. Did the trial court erroneously instruct the jury as to the effect of provocation on a self-defense claim? Did the trial court sufficiently express the reasonable doubt standard when it instructed the jury that, if there was a realistic or reasonable possibility that the defendant acted in self-defense, he was not guilty?
Background: The police were called to a street corner in Grand Rapids, where they found Keith Hoffman lying dead in a pool of blood. Police officers discovered several small baggies of crack cocaine and marijuana, plus spent nine millimeter casings and an unfired .40 caliber cartridge, lying near Hoffman's body. Witnesses told the police that two gun-toting men had walked up to Hoffman, exchanged words, and begun firing; one witness identified Sammie Bailey, Jr., as the shooter. With the aid of a tracking dog, police officers trailed Bailey to a house a couple of blocks from the scene of the shooting. Bailey and his half-brother, Terrill Lambeth, were arrested. Testing of the spent cartridges and a bullet in Hoffman's body established that two different weapons were involved, but the weapons were never found. Lambeth told police that Hoffman had robbed him at gunpoint several times in the past. Lambeth never called the police because, he said, Hoffman threatened to retaliate against Lambeth's family if he reported the robbery.

Bailey and Lambeth were both charged with open murder and felony-firearm, and tried jointly, with each defendant having a jury. The prosecution maintained that Bailey and Lambeth killed Hoffman in revenge for his robbing Lambeth. At trial, Bailey's jury heard a tape recording of a conversation that Bailey had with his mother shortly after his arrest, in which he admitted that he was the one who fired the shots. But Bailey's defense counsel argued that Bailey was merely present when Lambeth shot Hoffman. According to Lambeth, he approached Hoffman to talk about the robberies when Hoffman pulled a gun on him; fearing for his life, Lambeth said, he shot Hoffman.

Bailey's jury convicted him of second-degree murder and felony-firearm; Lambeth's jury convicted him of first-degree murder and felony-firearm. Bailey appealed, arguing that the trial court erred when it instructed the jury as to his self-defense claim. The Court of Appeals agreed and reversed Bailey's convictions, sending the case back to the trial court. The trial court should have instructed Bailey's jury that the prosecutor had to prove beyond a reasonable doubt that Bailey did not act in self-defense, the Court of Appeals said. The trial court committed a second error, the appellate panel concluded, in telling the jury that a person cannot claim self-defense "if what they do is confront someone, intending, by their mere presence, to provoke that person into doing something, and then take advantage of it." These errors were not harmless, the Court of Appeals concluded, reasoning that the flawed instructions went to the core of Bailey's defense and likely misled the jury into rejecting his self-defense theory. The prosecutor appeals.

Afternoon Session

KROHN v HOME-OWNERS INSURANCE COMPANY (case no. 140945)
Attorney for plaintiff Kevin Krohn: Craig J. Pollard/(734) 994-0200

Attorney for defendant Home-Owners Insurance Company: Allen J. Philbrick/(734) 761-9000
Attorney for amicus curiae Coalition Protecting Auto No-Fault: Liisa R. Speaker/(517) 482-8933
Attorney for amicus curiae Michigan Defense Trial Counsel, Inc.: James E. Brenner/(313) 965-8814
Attorney for amicus curiae Michigan Catastrophic Claims Association: Jill M. Wheaton/(734) 214-7629
Trial Court: Lenawee County Circuit Court
At issue: The plaintiff sued his no-fault insurer to recover the expenses of his experimental surgery in Portugal. The procedure is not approved by the Food and Drug Administration and is illegal in the United States. A jury returned a verdict in the plaintiff's favor, finding that the treatment was "reasonably necessary" under MCL 500.3107(1)(a) of the no-fault act. But in a split unpublished decision, the Court of Appeals reversed, noting that the plaintiff's treating U.S. physician did not testify that the experimental surgery was either "reasonable" or "necessary." Moreover, the trial court had failed to determine the surgery's scientific reliability before admitting expert witness testimony regarding the procedure. Was the surgical procedure a "reasonably necessary" allowable expense under the no-fault act, MCL 500.3107(1)(a)? Was the procedure "lawfully rendered" under MCL 500.3157? Did the Court of Appeals majority err in sua sponte (on the court's own motion) raising the issue whether the trial court should have excluded testimony from the plaintiff's medical witness? In determining issue of reasonable necessity under MCL 500.3107(1)(a), may the trier of fact consider whether the experimental procedure succeeded or the plaintiff's condition improved?
Background: Kevin Krohn, who became a paraplegic as a result of a motorcycle accident, underwent an experimental medical procedure – olfactory ensheathing glia cell transplantation – that involved surgery followed by intensive physical therapy. This procedure, which was being performed in Portugal, is not approved by the Food and Drug Administration; it is illegal to perform the surgery in the United States.

In March 2005, before undergoing the procedure, Krohn met with Dr. Steven Hinderer of the Rehabilitation Institute of Michigan. Hinderer, who specializes in physical medicine and rehabilitation, told Krohn that he could not recommend the experimental procedure. Krohn's health insurer denied coverage, as did Krohn's no-fault auto insurer, Home-Owners Insurance Company. Home-Owners told Krohn that it would pay for physical therapy and for testing to determine if he was a candidate for the surgery. But Home-Owners refused to pay for the surgery itself, noting that the procedure was experimental, lacked FDA approval, and could not be performed in the U.S.

Krohn elected to pay for the procedure himself. Ten days after undergoing the surgery in Portugal, he returned to the U.S, and began a physical therapy program at the Rehabilitative Institute.

Krohn sued Home-Owners under the state's no-fault act to recover out-of-pocket costs of about $51,000. At trial, Krohn testified that he noticed improvement immediately after the surgery. The evidence included video depositions of Hinderer and Dr. Lima, a member of the medical team that operated on Krohn. Hinderer testified that he did not prescribe or recommend the experimental surgery for Krohn, and that the procedure is not part of the standard clinical care for patients suffering from spinal cord injuries. With respect to Krohn's claimed improvement, Hinderer testified that he would not be able to determine whether any improvement was due to

the surgery, the aggressive physical therapy program, or a combination of both. The doctor acknowledged that he could not recall any patient with such a severe spinal cord injury improving with physical therapy alone to the same extent that Krohn experienced following the surgery.

Lima, a neurologist and neuropathologist at a Lisbon hospital, testified about his research and the procedure. He acknowledged that the surgery was experimental, but opined that it was reasonably necessary because there was no other option for a person with a chronic spinal cord injury.

Home-Owners moved for a directed verdict, arguing that the surgery was not covered by the no-fault act because it was neither "reasonably necessary" under MCL 500.3107(1)(a) nor "lawfully rendered" under MCL 500.3157. Under MCL 500.3107(1)(a), "personal protection insurance benefits are payable for . . . (a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation. . . ." MCL 500.3157 states in part: "A physician, hospital, clinic or other person or institution lawfully rendering treatment to an injured person for an accidental bodily injury covered by personal protection insurance, and a person or institution providing rehabilitative occupational training following the injury, may charge a reasonable amount for the products, services and accommodations rendered. . . ." But the trial court denied Home-Owners' motion and the jury returned a unanimous verdict in favor of Krohn, finding that the surgery was reasonable and necessary. Krohn was awarded $51,412.85 in allowable expenses, along with interest, case evaluation sanctions, and taxable costs.

On Home-Owners' appeal, the Court of Appeals reversed the trial court and remanded for entry of judgment in favor of Home-Owners. The majority held that Krohn's surgery was not reasonably necessary, noting that Krohn's own treating physician, Hinderer, did not testify that the procedure was either reasonable or necessary. Lima was not qualified to testify under MRE 702, the majority said; moreover, Lima acknowledged that the procedure had not gained general acceptance in the international medical community. "We reject the argument that defendant is required to pay for the costs of experimental surgery that is part of an experimental human clinical trial still in its infancy in another country," the majority concluded. The dissenting judge, who voted to affirm the jury's verdict, criticized the majority for raising sua sponte – on its own motion – the issue of the admissibility of Lima's testimony. Krohn presented sufficient facts and circumstances to present the issue of the treatment's reasonableness and necessity to the jury, the dissenting judge stated. Krohn appeals.

PEOPLE v LEE (case no. 141570)
Prosecuting attorney: Aaron J. Mead/(269) 983-7111
Attorney for defendant Kent Allen Lee: David M. Zessin/(616) 392-1821
Trial Court: Allegan County Circuit Court
At issue: The defendant flicked the penis of the three-year-old boy he was babysitting in order to get the boy's attention after a bath. The defendant pled guilty to third-degree child abuse. At sentencing, the trial court denied the prosecutor's request to require the defendant to register under the Sex Offenders Registration Act (SORA), concluding that the available information did not establish that the crime was a sexual offense. The court allowed the prosecutor to request a hearing to show that the crime was a sexual offense requiring SORA registration. The defendant was sentenced to five years of probation with the first ten weekends to be served in jail. Twenty months later, after defendant served his jail time and the sentencing judge retired, the prosecutor filed a motion to require the defendant to register under SORA. The successor judge granted the

motion. The Court of Appeals affirmed. Was the trial court's order, entered after the defendant had been sentenced and had begun serving his sentence, valid? Did the defendant's touching of the victim's genitals "by its nature constitute a sexual offense against an individual who is less than 18 years of age" within the meaning of MCL 28.722(e)(*xi*) such that the defendant is required to register under SORA?

Background: While babysitting for friends, Kent Lee twice flicked the penis of the friends' three-year-old son. Lee later testified that he was frustrated that the boy would not put his pajamas on and flicked the child's penis to get him to cooperate.

Lee was charged with second-degree criminal sexual conduct and second-degree child abuse as a fourth-offense habitual offender; he pled guilty to third-degree child abuse as a second-offense habitual offender. At sentencing, the prosecutor argued that the trial court should require Lee to register under the Sex Offenders Registration Act. SORA does not require registration by a defendant convicted of third-degree child abuse, but a catch-all provision, MCL 28.722(e)(*xi*), requires registration for a violation of state law that "by its nature constitutes a sexual offense against an individual who is less than 18 years of age." The trial court denied the request, concluding that the information available at sentencing did not establish that Lee committed a sexual offense. The judge sentenced Lee to five years of probation with the first ten weekends to be served in jail, with no requirement of SORA registration. However, the judge did rule that the prosecutor would be permitted to request a hearing in order to show that the crime fell into SORA's catch-all category. Neither party appealed.

Twenty months later, after Lee had served his jail time and the sentencing judge had retired, the prosecutor moved to require Lee to register under SORA. Over Lee's objections, the successor judge held an evidentiary hearing and then granted the motion. The judge concluded that, because the sentencing judge had retained jurisdiction in order to decide the issue, there was no procedural impediment to requiring SORA registration at that time. The judge then ruled that, based on the information used to support Lee's plea as well as Lee's testimony at the evidentiary hearing, Lee must register as a sex offender.

In a published opinion, the Court of Appeals held that there was no error in the procedure for requiring registration or in the lower court's substantive ruling. A trial court may impose SORA registration at any time while the court has jurisdiction over a defendant, the Court of Appeals held. In this case, the appellate panel said, the lower court could require Lee to register because he was still on probation. Moreover, the panel held, the trial court did not err in concluding that Lee's conduct met the requirements of SORA's catch-all provision. Because Lee had flicked the child's penis as a form of bullying, the evidence was sufficient to show that Lee had touched the child's penis in a sexual manner for the purpose of inflicting humiliation, the Court of Appeals stated. Lee appeals.

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